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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 34

NATIONAL LABOR RELATIONS BOARD,

PETITIONER

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether peaceful picketing by a union, which does not represent a majority of the employees of the employer involved, for purposes of organization and to seek recognition as the employees' exclusive bargaining agent, is an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act.

THE FACTS

The facts are generally as stated by the Board in its brief. They can be reduced to the following: A union, after having won a Board-conducted election and been duly certified, is unsuccessful in negotiating a contract. Thereafter it engages in a strike and picketing in the course of which the striking employees are replaced by the employer so that the union loses its majority. The employer then invokes those portions of the Act which permit it to obtain an election, over the union's objection, in which election the striking former employees of the employer are not permitted to vote. The strikebreakers vote the union out, but the union nevertheless continues its picketing, this time seeking not a contract but the recognition which it once held. The Board then enjoins such picketing on charges filed by the employer, invoking Section 8(b)(1)(A) to do so.

The picketing was at all times entirely peaceful (R. 67). The business operations of the Company were not disrupted by the picketing, and there was no stoppage of delivery trucks or interference with the receiving of supplies or the sending out of merchandise, and there is no showing or attempt to show that the picketing resulted in any economic loss or other injury whatsoever to the employer or to its strike replacements. The Trial Examiner specifically found, and the Board's majority opinion did

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[1] The Board's statement of the question presented assumes that the demand was for purposes of "immediate" recognition. There is absolutely nothing in the record to support this conclusion concerning the immediacy of the demand, but, on the contrary, such a conclusion is directly negated by the outright repudiation of claim for exclusive recognition contained in the union's letter of February 16th (R. 14). Moreover, it is clear from a reading of the Board's decision as a whole that this factor of immediacy did not constitute any element in the Board's conclusion that minority picketing for recognition was proscribed by Section 8(b)(1)(A), and the holding of the Board is such as to proscribe all such picketing regardless of any question of immediacy.

not controvert, that nothing in the Union's conduct "directly threatened or intimidated the employees in the exercise of their rights guaranteed in Section 7." (R. 79.)

SUMMARY OF ARGUMENT

I

Picketing to secure the recognition of a minority union does not violate Section 8(b)(1)(A) of the Act as is contended by the Board. As indicated by the legislative history of that section, Congress intended thereby merely to deal with activities of unions which, by means of violence or similar intimidation, sought to deprive employees of rights protected under Section 7.

A. Section 8(b)(4)(C) of the Act, expressly dealing with recognition picketing, is the key to the invalidity of the Board's interpretation of Section 8(b)(1)(A) made at the time it rendered its decision herein, and the newly enacted Section 8(b)(7) of the Act, expressly dealing with other aspects of organizational and recognition picketing, is the key to the invalidity of the Board's present contention that Section 8(b)(1) continues to provide the Board with a broad means of regulating minority picketing for purposes of organization or recognition. By Section 8(b)(4)(C) Congress had then, and by Section 8(b)(7) has now, expressed the sole extent to which it intended to regulate as an unfair labor practice picketing by a union of an employer to secure that employer's recognition of it as the representative. And by Section 8(b)(4)(C) Congress had restricted such picketing for recognition only in the situation where another union has been certified by the Board as the representative of the employees just as 8(b)(7) now restricts such picketing in greater scope but to a lesser degree than now asserted by the Board. To prohibit picketing for recognition in other and additional situations, as the Board by its interpretation of Section 8(b)(1)(A) does, is to embrace a purpose which Congress has deliberately renounced.

B. If Sections 8(b)(4)(C) and 8(b)(7) mean what they say, then Section 8(b)(1)(A) cannot mean what the Board holds. These former two sections and the latter have separate functions which do not overlap. Section 8(b)(4) [and now Section 8(b)(7)] is concerned with the "end sought," with defining "proscribed objectives." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 702; see also *id.* at 704. By Section 8(b)(1)(A), on the other hand, "Congress was aiming at means, not end." *Perry Norvell Co.*, 80 NLRB 225, 239. "By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal." *Ibid.* When the Board interprets Section 8(b)(1)(A) to prohibit peaceful picketing, because its *purpose* is to secure the recognition of a minority union, it transforms Section 8(b)(1)(A) from a provision designed to curb picketing, when conducted by coercive means, into an instrument to curb picketing, however peaceful, because of the end it furthers. This fundamentally alters the function of Section 8(b)(1)(A) within the statutory scheme.

C. The legislative history of Section 8(b)(4)(C); subsequent efforts in Congress to regulate minority picketing for recognition in broader scope and in more detail; and, finally, the legislative history of the recently enacted Section 8(b)(7) which deals specifically with various areas of regulation of recognition picketing, all go to show that Congress, following considerable discussion and debate, has set forth precisely to what degree it considered recognition picketing should be curtailed by the Board. It is not for the Board to be a super-Congress and to proscribe in areas unreached by Congress in Sections 8(b)(4)(C) and 8(b)(7).

D. The Board's construction of Section 8(b)(1)(A) conflicts with Sections 8(c) and 13; it reverses a long-standing

interpretation; and it renders Sections 8(b)(4)(C) and 8(b)(7) redundant.

1. Section 8(c) protects, and peaceful picketing constitutes, the "expressing" and "dissemination" of "views, argument, or opinion" "in written, printed, graphic, or visual form." The Supreme Court's decision in *Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, confirms the exemption of peaceful picketing from the reach of Section 8(b)(1)(A) and the applicability of Section 8(c) to guarantee its immunity.

2. "By § 13, Congress has made it clear that • • • all • • • parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act." *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 673. There is nothing in Section 8(b)(1)(A) which "specifically" provides for the impairment of the right to strike and picket which the Board would effect. See *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 284. Little indeed would be left of the right to strike if the right to picket were not protected as an inseparable part of it (*Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 504-505), and for that reason Section 13 cloaks both (*Sales Drivers Union* v. *N.L.R.B.*, 229 F. 2d 514, 517-518, cert. denied, 351 U.S. 972).

3. By its present construction of Section 8(b)(1)(A), adopted late in 1957, the Board overturns a settled and uniform interpretation first made in 1948, within a year of the effective date of the Taft-Hartley amendments in 1947, and undeviatingly adhered to for nine years. "At this late date the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation." *United States* v. *Chi. N.S. & Mil. R. Co.*, 288 U.S. 1, 13-14.

4. Section 8(b)(4)(C) [and now Section 8(b)(7) of the

Act] "has no place in this Statute if Section 8(b)(1)(A) can be interpreted broadly to forbid picketing by a minority labor organization for recognition. For the type of picketing prohibited by Congress in Sections 8(b)(4)(C) and 8(b)(7) necessarily is in the category now forbidden under Section 8(b)(1)(A). Thus, through administrative interpretation of one provision, the specific language of another statutory provision in this Act has been reduced to a useless gesture."* It goes without saying that "We are not at liberty to construe any statute so as to deny effect to any part of its language." *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116.

E. "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 99-100. The Board in this case has isolated a single principle, pushed it to an unreasonable extreme, and reached a determination which Congress, fully aware of the whole range of the problem and the opposing claims and interests with which it bristles, has deliberately refrained from embracing.

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*Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430.

ARGUMENT

I

PRELIMINARY CONSIDERATIONS

Prior to the decision of the Board in the instant case, Section 8(b)(1)(A) had never been thought available for the purpose of dealing with minority union picketing; on the contrary, as will be seen, that Section had heretofore been thought to apply only to enjoining union conduct, whether involving picketing or other type of activity, which is violent in nature and is designed directly to coerce employees in the intimidatory sense through fear of direct physical or economic retaliation. That Section, insofar as it had relation to picketing at all, was concerned with the manner or method of picketing and not the objects thereof; the latter were dealt with in Section 8(b)(4) and later in Section 8(b)(7). In other words, the Section was intended to proscribe actual duress, not the indirect pressure that is the result of all picketing.

Notwithstanding all this, the Board has here found "restraint or coercion" to exist in the mere possibility that the picketing might serve to cause economic loss to the employer, which in turn might be reflected by possible economic loss to the employees of the employer, so that this fear of possible economic loss operates to interfere with the free choice and selection of bargaining representatives given employees under Section 7 of the Act, as well as to coerce the employer into "unlawfully" dealing with a minority union.

We will see that on the basis of the foregoing reasoning the Board could find justification for proscription of all picketing, regardless of its purpose or means, for all picketing has this effect. We will see that picketing or other similar inducements to strike action as such are not specifically proscribed by Section 8(b)(1)(A), and that Section 13 of the Act protects the right to picket unless other-

wise "specifically" dealt with. We shall further see that under Section 8(b)(4)(C) of the Taft-Hartley Act, as enacted in 1947, and under Section 8(b)(7) of the newly enacted Labor-Management Reporting and Disclosure Act of 1959, Congress has specifically, and in detail, dealt with the subject of picketing which is carried on for purposes of organization or recognition.

In view of the foregoing, it would appear that the Board has a heavy burden to support its present position that Section 8(b)(1)(A) of the Act was, and is, intended to give to the plain or literal language of Section 8(b)(1)(A) picketing for purposes of organization or recognition in the broad and undefined areas not embraced under Section 8(b)(4)(C) of the Taft-Hartley Act, and not embraced under Section 8(b)(7) of the Act as amended in 1959.

The Board is unable to support its burden by reference to the plain or literal language of Section 8(b)(1)(A) which makes no reference to picketing as such. Of necessity then, it turns to references to the legislative history of Section 8(b)(1)(A) which, we will see, at best are inconclusive, and then to arguments of policy which, if they have any validity at all, are better directed to Congress, and which, in fact, have quite recently been directed to Congress, with the result that that body, in response, has enacted a new section of the Taft-Hartley Act, designated as Section 8(b)(7), which section deals specifically and in detail with the subject of picketing for purposes of organization or recognition. In this case the Board, notwithstanding this recent action of Congress in imposing various restrictions and prohibitions on the right to picket for organization or recognition, and unmindful of the suggestion of the Solicitor General that this recent action of Congress has disposed of the matter (Memorandum for the National Labor Relations Board, filed in *United Rubber Workers* v. *N.L.R.B.*, No. 316, October Term, 1959, pp. 3-5), proceeds to seek three strings to its anti-picketing bow—the strong but

specific one recently given it by Congress under Section 8(b)(7), the earlier one given it under Section 8(b)(4)(C) and, in addition, the broad, all-encompassing one which it contends was granted under Section 8(b)(1)(A). For the Board to take such a position indicates a point of view "so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretive process". (*Western Union Telegraph Company* v. *Lenroot*, 323 U.S. 490 at 508.)

II

WHAT IS "ORGANIZATION" OR "RECOGNITION" PICKETING AND THE EXTENT TO WHICH SUCH PICKETING HAS, UP THROUGH TAFT-HARTLEY IN 1947, BEEN SANCTIONED BY THE COURTS AND THE CONGRESS.

A. The Principle as Recognized by the Courts.

Before proceeding to answer the Board's various arguments, it might be well to examine briefly what is implied in the concept of "recognition" picketing so traditional in the labor movement but here under attack, and to see just how the courts and the Congress, up to the time of the enactment of Section 8(b)(1) and Section 8(b)(4)(C), have regarded that type of picketing. If, as we think true, there has been a general acceptance of the practice of picketing for purposes of organization or recognition—indeed, there has been a national labor policy affording that type of picketing protection (cf. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448)—it cannot be easily assumed that Congress would attempt to proscribe or limit the practice other than by specific language precisely directed to practices which Congress thought required limitation.

Whatever may be the rights under Section 7 of the Act of unorganized employees, such as those employed by Curtis in the present case, to refrain from union activities,

or to act as strike breakers, or to choose to have no union to bargain for them, there are other and corresponding rights which are not subordinate to these rights of the non-union employees, and which find equal protection under Section 7 of the Act as well as in the general framework of the Federal labor policy as earlier set forth in the Clayton Act and the Norris-LaGuardia Act. One of the most important of these union rights is the right to seek organization and collective bargaining relationships throughout an entire trade or industry in particular communities as a means of stabilizing competitive wage rates and working conditions within such trade or industry. In the present case, for instance, Petitioner Local Union 639 must of necessity seek to organize the complacent employees of the Curtis Company and achieve a collective bargaining relationship with it in order to protect the wages and working conditions of other members of the Union working in other storage and furniture stores in the Washington, D. C., area. This was done by picketing Curtis for purposes of organization and recognition.[3]

[3] The Union in the present case was influenced to picket Curtis for considerations in addition to a desire to extend organization throughout the storage and furniture industry. Here it had already achieved recognition and bargaining rights, following which it had engaged in a strike, with resultant picketing. The bargaining negotiations having broken down over the issue of union security, the Union had the choice either of capitulating or of bringing into play its traditional economic weapon. In the course of the strike and because of it, the Union lost its former majority, and when the Employer took advantage of a much criticized provision of Taft-Hartley to force the Union into an election in which the strikers could not vote, the Union lost its bargaining rights completely. If ever there existed moral or economic justification in a labor dispute for picketing to protest this course of events and to regain the position which the Union once held, that justification exists in this case; until the majority decision of the Board herein it had never been generally suggested that the picketing under the circumstances of this case was even subject to criticism, let alone constituted a violation of Federal law.

The principle of picketing for such purposes has long been accorded recognition by our courts. In *American Steel Foundries* v. *Tri-Cities Central Trades Council, et al.*, 257 U.S. 184, at 209, Chief Justice Taft stated that to render collective bargaining effective:

> "employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the community united, because in the competition between employees, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious . . . ."

In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, Justice Stone restated the proposition as follows (at p. 503):

> "Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, an elimination of price competition based on differences in labor standards is the objective of any national labor organization."

More lately, in *American Federation of Labor* v. *Swing*, 312 U.S. 321, at 326, the Court stated:

> "A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer

> and those directly employed by him. The inter-dependence of economic interest of all engaged in the same industry has become a commonplace."

A classic expression of the principle is contained in the decision of Judge Andrews in *Exchange Bakery* v. *Rifkin*, 245 N.Y. 260, at 263; 157 N.E. 130, at 132:

> "The purpose of a labor union to improve the conditions under which its members do their work . . . may justify what would otherwise be a wrong. So would an effort to increase its members and to unionize an entire trade or business . . . Economic organization today is based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor . . . Resulting injury is incidental and must be endured."

B. The Principle as Recognized by Congress.

To obtain an understanding of how Congress regarded the concept of organizational or recognition picketing as of the time of Taft-Hartley, it is helpful—indeed necessary—to examine Congressional enactments in the field. *U.S.* v. *Hutcheson*, 312 U.S. 219. It is significant that Congress, both in the Norris-LaGuardia Act (47 Stat. 70) and in Taft-Hartley (as well as, of course, in the Wagner Act as the predecessor to Taft-Hartley), recognized the principle expressed in the above quoted citations from the *Tri-Cities*, *Apex* and *Swing* cases. It was abuse of the use of the injunction to bar recognition or organizational picketing, at least in part, which prompted Congress to give attention to that right and free it from the injunctive process in the Federal courts. See Frankfurter and Greene, *The Labor Injunction*, and *Report on the Labor Injunction to the*

Senate Labor Committee, dated February 8, 1951, 27 LRRM 37. The Norris-LaGuardia Act (Sec. 104) provides that no court shall issue an injunction prohibiting any person or union from "Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence". That Act [Sec. 113 (e)] further goes on to define the phrase "labor dispute" as including "any controversy concerning terms or conditions of employment, or concerning the association or *representation* of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (Emphasis supplied.)

By giving particular protection to the right of union members to picket in a dispute over representation, and this regardless of whether any of the union members were employed by the employer or whether an employer-employee relationship existed, Congress would appear to have sought, as part of a national labor policy, to protect the type of picketing involved in the present case. Obviously, an injunction could not be obtained in the Federal courts under the provisions of the Norris-LaGuardia Act to enjoin the picketing in the present case. See *Fur Workers Union, Local 72*, v. *Fur Workers Union, Local 1939*, 105 F. 2d 1, 70 App. Div. 122, aff'd in 308 U.S. 522. In view of this Congressionally-expressed policy of protecting the type of picketing here engaged in, it would seem that Congress would have used very clear language in the subsequently adopted Taft-Hartley Act if it intended to reverse this policy. Federal enactments in the field of labor relations, it must be remembered, must be read as a comprehensive whole where we have before us legislation which "is practically and historically one of a series of enactments touching one of the most sensitive national problems." *United States* v. *Hutcheson*, 312 U.S. 219, 235.[28]

[3a] It is an essential premise of the Board's decision (119 NLRB at 238-39) as well as of its brief here (Pet. Br. 28-29), that an employer commits an unfair labor practice whenever he gives exclusive recognition to a union which does not represent a majority of the employees in the appropriate unit. This proposition—presented here as an *ipse dixit*—is unsupportable under the statute, and is erroneous as a matter of principle.

The only reference in the statute to *exclusive* representation is in § 9(a), which provides that a majority union shall be the exclusive bargaining representative of the employees in an appropriate unit. § 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the § 9(a) representative, that is, with the majority union. But it does not follow from the fact that it is an unfair labor practice *not* to bargain with a majority union as exclusive representative, that it is permissible to do so *only if* it is the majority union. Just because activity is not required by law does not mean that it is prohibited. Compare *San Diego Unions* v. *Garmon*, 359 U.S. 236. Sections 2(5) and 2(9) of the Act recognized that a labor organization could and did negotiate for changes in working conditions *even when no employees* were represented. *A fortiori*, it could bargain for changes when *some* employees, less than a majority, was represented. In emphasizing the importance of the broad definition in Section 2(9), the House Committee made specific reference to the *American Steel Foundries* case, *supra* p. 11. See H. Rep. No. 1147, 74 Cong., 1st Sess. 100 et seq.

By express legislative history, Congress was thus guaranteeing the right to picket as illustrated by the *American Steel Foundries Case*. The definition of labor dispute in § 2(9) of the Wagner Act was retained in the Taft-Hartley Amendments as a matter of deliberate choice, having been omitted from the House Bill partly to reverse Board decisions holding that a labor dispute exists "whenever a union disagrees with an employer on any subject, *notwithstanding that the union does not represent employees of the employer . . .*" H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 18-19, in 1 Leg. Hist. 309-310 (emphasis supplied). The Senate version, which retained the Wagner Act definition, prevailed in conference, and in the bill. The Congress thus consciously adopted the Board's interpretation of "labor dispute" as including the "stranger" situation, and the present Board is merely trying to read the rejected House view into the statute.

Rather than discuss the merits of this premise whose ramifications extend far beyond the present case, the Board states flatly that the issue is "settled" in its favor. (Pet. Br. 26.) On the contrary. Of the judicial decisions cited by the Board, *id.* at n. 10, all but one involves a situation in which more than one union was involved, and the statement in *Dixie Bedding Mfg. Co.* v. *N.L.R.B.*, 268 F.2d 901, 905 (C.A. 5) was mere dictum.

The situation of two conflicting unions is significantly different, for the employer's aid to one union, by recognition or otherwise, interferes with the free choice of the employees among representatives. This was the situation in *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, and the decision of the 4th and 9th Circuits cited by the Board. In the *Greyhound* case this Court stressed the Legislative History in which Congress had noted that "once an employer has conferred recognition on a particular organization *it has a marked advantage over any other* in securing the adherence of employees, *and hence in preventing the recognition of any other*. 303 U.S. 261, 267 (emphasis supplied).

That Congress did not intend under the general terms of Section 8(b)(1)(A) of the Taft-Hartley Act to repeal the national policy of protecting recognition or organizational picketing by majority or minority unions is seen in many ways. First, Taft-Hartley itself recognizes the extension-of-organization principle set forth in the *Tri-Cities* and related cases and in the Norris-LaGuardia Act, when in the Declaration of Policy contained in that Act (Sec. 1) it is pointed out that the inequality of bargaining power of unorganized employees burdens commerce "by depressing wage rates and the purchasing power of wage earners in industry and *by preventing the stabilization of competitive wage rates and working conditions within and between industries*". (Emphasis supplied.)

Secondly, the Taft-Hartley Act (Sec. 2 (9)) adopts the same broad definition of "labor dispute" that is contained in the Norris-LaGuardia Act, again reaffirming that such a dispute can exist in a dispute over representation where there is no proximate employer-employee relationship. Finally, the Taft-Hartley Act, in Section 7, adopts the same broad description and protection of the rights of self-organization and collective bargaining and engaging in concerted activities for purposes of mutual aid and protection as is contained in the Declaration of Policy of the Norris-LaGuardia (Sec. 102) and as was contained in Section 7 of the Wagner Act.

After the Senate-House conference on the Taft-Hartley bill, Senator Taft stated on the floor of the Senate:

"The conferees rejected the broad prohibition of all kinds of strikes. They rejected the repeal of the Norris-LaGuardia Act. The provisions regarding injunctions are exactly those which were in the Senate bill and were approved by the Senate. The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes." (93 Cong. Rec. 6603.)

It would appear that these Taft-Hartley reaffirmations of a national labor policy which seeks to protect the right of working men to engage in concerted activities for their mutual aid and protection, with particular reference here to the need for eliminating conditions which prevent the stabilization of competitive wage rates and working conditions within industries, are entirely at variance with the prohibitions on recognition picketing that the majority of the Board seeks to read into Sec. 8(b)(1)(A) of the Act. And certainly, if Congress had intended such prohibitions, it would have done so directly, by express language, and not by the devious and indirect means of 8(b)(1)(A) generalities.

C. Congress, in enacting Section 13 of the Act, gave special and explicit protection to the right to strike and picket for traditional purposes.

Congress did not stop with the safeguards in Section 1 and Section 7. Possibly fearful of administrative attempts to nullify the rights there protected, it made certain that the Act's other broad provisions would not be utilized, by a process of administrative interpretation, for the purpose of outlawing striking or picketing activities which prior to Taft-Hartley had not been federally condemned, and which Congress itself in Taft-Hartley had not specifically condemned. It did so by the enactment of Section 13 of the Act. Section 13 reads as follows:

"Sec. 13. Nothing in this Act, except as *specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish *in any way* the

right to strike, or to affect the limitations or qualifications on that right." (Emphasis supplied.)

This Court had occasion to consider the meaning and effect of this provision in the case of *N.L.R.B.* v. *International Rice Milling Co.*, 241 U.S. 665. It there stated (p. 672):

> "That Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in § 13 as follows:
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> "'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.'" (61 Stat. 151, 29 U.S.C. (Supp. III) § 163.)
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> "By 13, Congress has made it clear that § 8(b)(4), *and all other parts of the Act* which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read *only* if such interference, impediment or diminution is '*specifically provided for*' in the Act. No such specific provision in § 8(b)(4) reaches the incident here. The material legislative history supports this view." (Emphasis supplied.)[4]

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[4] The Board in its brief in the present case does not argue that the right to picket can not be equated with the right to strike under Section 13. It is to be noted that the *Rice Milling* case, supra, involved picketing only, there being no strike of *Rice Milling* employees. The Board has consistently equated striking with picketing as far as Section 13 protections are concerned. See e.g. *Schultz Refrigerated Service, Inc.*, 87 NLRB 502. The Court of Appeals for the District of Columbia, in *Campbell Coal (Sales Drivers, Helpers & Building Construction Drivers Local Union 859*, etc. v. *NLRB*, 97 U.S. App. D. C. 173, 229 F. 2d 514, cert. den. 351 U. S. 972) has directly equated striking with picketing and has given picketing the same protection under Section 13 that striking has under that section.

III

MINORITY PICKETING FOR RECOGNITION IS NOT SPECIFICALLY PROSCRIBED UNDER SECTION 8(b)(1)(A); NOR DOES ITS LEGISLATIVE HISTORY INDICATE ANY INTENT TO DO SO

A. Section 8(b)(1)(A) does not by its terms proscribe minority picketing for recognition.

Returning now to the question of just what Congress has done in respect to recognition picketing, the answer is that it is *not* specifically provided in Section 8(b)(1)(A) that picketing for organizational purposes or for recognition, following the losing of a Board-conducted election, or by a minority union, is unlawful. Indeed, when it has taken some 30 pages of tortuous argument by the Board majority in its opinion in this case to demonstrate that picketing in the circumstances of this case is unlawful, it can hardly be asserted that the present picketing has been *specifically* outlawed. Section 8(b)(1)(A) provides simply that it shall be an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in Section 7". On the other hand there are specific proscriptions in Sections 8(b)(4)(C) & 8(b)(7).

B. The Legislative History of Section 8(b)(1)(A).

What was the purpose of Section 8(b)(1)(A)? A study of the legislative history of that section reveals clearly that its purpose was to enjoin union activities which were violent in nature, and which sought, through use of physical violence or threat thereof, to coerce employees in the exercise of the right granted to them in Section 7 to refrain from joining or cooperating with a union.

Section 8(b)(1)(A) originated in the Senate and had no counterpart in that form in the House. After the Senate Labor Committee by a closely divided vote rejected its

inclusion in the bill it would report,[5] a minority stated it would offer on the Senate floor an amendment making it an unfair labor practice for a union "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[6] The thought behind the amendment was the "many instances of union coercion of employees such as that brought about by *threats of reprisal* against employees and their families in the course of organizing campaigns; also direct interference by *mass picketing and other violence.* * * * We believe that the freedom of the individual workman should be protected from duress by the union as well as duress by the employer"[7] (Emphasis supplied.)

The amendment was thereafter offered on the Senate floor by Senator Ball.[8] It met with much opposition.[9] To placate that opposition the words "interfere with" were expunged from the amendment by unanimous consent.[10] This was done to allay fear that, in derogation of "union organizational activities," the amendment could "be construed to mean that any conversation, any persuasion, any urging upon the part of any person to persuade another to join a labor organization, would constitute an unfair labor practice."[11]

Even as so restricted, it was charged that the amendment "would slow up the organizational activity of unions,"[12] that "it will have the effect of outlawing organizational strikes and strikes for recognition."[13] In answer to this charge a colloquy ensued between Senators Taft

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[5] S. Rep. No. 105, 80th Cong., 1st Sess., 50, in 1 Leg. Hist. 456; 93 Cong. Rec. 4435, in 2 Leg. Hist. 1204.
[6] *Ibid.*
[7] *Ibid.*
[8] 93 Cong. Rec. 4016, in 2 Leg. Hist. 1018.
[9] 93 Cong. Rec. 4016-4025, in 2 Leg. Hist. 1018-1033.
[10] 93 Cong. Rec. 4271, in 2 Leg. Hist. 1138-1139.
[11] *Ibid.*
[12] 93 Cong. Rec. 4430, in 2 Leg. Hist. 1195.
[13] 93 Cong. Rec. 4431, in 2 Leg. Hist. 1197.

and Saltonstall which has every earmark of being the definitive summing up by its proponents of the reach of Section 8(b)(1)(A). Senator Saltonstall initiated the colloquy: "I would appreciate very much, in order to make the matter clear in my own mind, if . . . Senator [Taft] . . . would give an example of a restraint he would consider an unfair labor practice, an action which would not be a restraint, an action which would be coercion, and an action which would not be coercion, within the meaning of the words of the bill and the amendment."[14] Senator Taft began by stating his understanding of the reach of the existing section against employers:[15]

> ". . . I understand the present section against employers has been used by the Board to prevent employers from making threats to employees to prevent them or dissuade them from joining a labor union. They may be threats to fire the man, of course, in the extreme case. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union. Those are the usual types of coercion which have been held to be a violation of the section on the part of the employers. In the case of employers, there have also been some cases of threats of violence . . ."

Senator Taft then explained the reach of the amendment against unions:[16]

> "In the case of unions, in the first place, there might be a threat that if a man did not join, the union would raise the initiation fee to $300, and he would have to pay $300 to get in; or there might be a threat that if he did not join, the union would get a closed-shop

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[14] 93 Cong. Rec. 4435, in 2 Leg. Hist. 1205.
[15] *Ibid.*
[16] 93 Cong. Rec. 4435-4436, in 2 Leg. Hist. 1205.

agreement and keep him from working at all. Then, there might be a threat of beating up his family or himself if he did not join and sign a card. I think, when we get to the case of unions, there might be the actually violent act of forcibly, by mass picketing, preventing a man from working.

Let us take the case of mass picketing, which absolutely prevents all the office force from going into the office of a plant. That would be a restraint and coercion against those employees, an interference with their right to work."

Senator Taft then summed up:[17]

"The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, *"You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them,* but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment." (Emphasis supplied.)

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"[The amendment] will slow up organizational drives only if they are accompanied by threats and coercion. The cease-and-desist order will be directed against the use of threats and coercion. *It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees."* (Emphasis supplied.)

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[17] 93 Cong. Rec. 4436, in 2 Leg. Hist. 1206, 1207.

> • • • It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, *conducting peaceful picketing, or employing persuasion.*". (Emphasis supplied.)

In a later analysis, Senator Taft explained that the prohibitions of Section 8(b)(1)(A) "apply to *coercive acts* of unions against employees who do not wish to join or did not care to participate in a strike or a picket line";[18] and the "coercive conduct" against which the employee is protected is "physical and economic coercion. For example, in the absence of a valid compulsory union-membership contract if a union compelled a man to join it or to sign an application card by threatening him with loss of his job, this would be economic coercion. Both threats of violence and threats of this kind are prohibited. • • • [It] will cover intimidating conduct or physical force used . . . [in] picketing. . . ."[19]

What clearly emerges from the debate is absolute affirmation that peaceful picketing is not comprehended within the concept of restraint and coercion. There is unequivocal assurance that "you can put up signs;" that none of the "peaceful methods of organizing employees" is affected: that no one would be prevented from "conducting peaceful picketing."[20] Indeed, the kind of picketing which does fall within the scope of Section 8(b)(1)(A)—mass or violent—denotes precisely the picketing which does not—peaceful. And on the face of Section 8(b)(1)(A) it would be an extraordinary interpretation of its words to find, as in this case, that it constituted restraint or coercion for a single picket to walk quietly up and down in front of an employer's premises carrying a sign.

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[18] 93 Cong. Rec. 6859, in 2 Leg. Hist. 1623 (emphasis supplied).

[19] 93 Cong. Rec. A3369.

[20] In 1949 Senator Taft, together with Senators Smith and Donnell, labelled as "of course . . . untrue" the charge that Section 8(b)(1)(A) "forbids 'peaceful' picketing." S. Rep. No. 99, Pt. 2, 81st Cong., 1st Sess., 24.

Nor is there any substantial showing that it was thought that within the meaning of Section 8(b)(1)(A) peaceful picketing acquires the character of restraint or coercion because of the purpose it furthers. To be sure, the Board musters a few examples from an early stage of the debate which may tend to suggest this (Bd. Br. p. 28). But each of these examples was tendered *prior* to the deletion of the words "interfere with" from Section 8(b)(1)(A). It may be that, viewed nakedly, the deletion is not substantial, but its true significance lies in its reflection of a marked change in mood.[21] For the earlier expansiveness in describing Section 8(b)(1)(A) was never again suggested after this change. For example, before the change, Senator Ball was strident in his claim that Section 8(b)(1)(A) would reach "false promises or false statements" by unions;[22] after the change, Senator Ball agreed that Section 8(b)(1)(A) does not reach "misrepresentation."[23] And, after the change, Senator Taft's authoritative explanation of Section 8(b)(1)(A) did not even intimate that peaceful picketing would come within its purview by virtue of its purpose. It is fair to say that, whatever ambitions its proponents may have had for Section 8(b)(1)(A) at the beginning, they quickly squelched them in favor of a more modest role, lest they fail to have any acceptance of it at all.

C. The lack of analogy between Secs. 8(b)(1)(A) and 8(a)(1).

Nor is the Board's position helped by the much stressed circumstance that the Section 8(b)(1)(A) restriction upon unions parallels the Section 8(a)(1) restriction upon employers. Both employers and unions are subjected to a duty to the employees, and in that meaningful sense equality is established between them. But the duty may be different precisely because unions and employers are different in character, function, and history. "The same words, in different settings, may not mean the same thing."[24] Even

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[21] *Cf. Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487.
[22] 93 Cong. Rec. 4016, 4017, in 2 Leg. Hist. 1018-1019, 1020.
[23] 93 Cong. Rec. 4434, in 2 Leg. Hist. 1202.
[24] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678.

before the deletion of the words "interfere with," Senator Taft recognized that interference, restraint, and coercion in application to labor organizations may have a "different implication. . . ."[25] And so, "Because Section 8(b)(1) was designed as the co-part of Section 8(a)(1), it does not follow that each and every rule established by the Board in cases involving employer interference, restraint, and coercion must mechanically be transposed to cases involving union restraint and coercion, with every 'i' dotted and every 't' crossed and without regard to whether or not the controlling principles are the same."[26] It is thus not "very significant that Section 8(b)(1) follows the familiar phraseology of Section 8(a)(1), although it omits the word 'interfere', or that its sponsors repeatedly explained that the new section would make it unfair for labor organizations to engage in activities which were unfair when engaged in by employers. While the Board's decisions under the older section may give some slight help in interpreting the new provision, it is clear that there are important differences." Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 30-31 (1947).[27]

[25] 93 Cong. Rec. 4023, in 2 Leg. Hist. 1028.

[26] *International Typographical Union*, 86 NLRB 951, 1021, affirmed on this point, 193 F. 2d 782, 801, 806 (C.A. 7), cert. denied, 344 U.S. 812.

[27] The writer goes on to say: "For example, although an employer is forbidden to express the hope that he may be able to raise wages and improve working conditions if the union is defeated, the counter-argument made by labor organizations to secure union members that if enough employees join the union it will be able to obtain additional advantages—is clearly legitimate. Nor would it seem to be improper for a union to promise economic advantages only to those who become members. Many unions offer mutual insurance, vacations, and similar benefits to members, in addition to what is obtained by collective bargaining, which surely they must be free to point out in seeking members. Much the same distinction is true of social pressures. While an employer may not segregate a union employee in order to hold him up to the ridicule of his fellows, it will scarcely be asserted that labor organizations are forbidden to ostracize nonmembers or to impose other social pressures upon them."

D. Section 9(c)(3) is not applicable.

The Board also contends that Section 9(c)(3) of the Act supports its interpretation of Section 8(b)(1)(A), the argument being that, as Section 9(c)(3) prohibits the Board's direction of a second election within one year of the Board's conduct of a valid election within the bargaining unit, the policy of Section 9(c) (3) is subverted if a union may strike or picket for recognition during a period that the Board's election machinery is unavailable. The argument proves too much. If it were valid, it would prohibit a recognition strike or picketing by a majority no less than a minority within one year of a previous election, for in either event the Board may not conduct an election during that time. No one suggests that this can possibly be true. *Ecko Products Co.*, 117 NLRB 137, 142-144. Furthermore, it is settled that the Board's election machinery exists as an alternative to, not in lieu of, self-help to secure recognition. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62. Nothing in Section 9(c)(3) is designed to affect this fundamental premise. Its role is considerably more modest. Its purpose is to bring about a single change in the Board's pre-1957 electoral practice. Before 1947 the Board would entertain a petition of a defeated union for a second election within a year of the union's loss of a preceding election in substantially the same unit if it made "a showing of renewed and extended organizational efforts." *Borden Company*, 69 NLRB 947, 948, and cases cited at notes 4 and 7. See also, *J. C. Blair Co.*, 74 NLRB 408, 409. Critical of this practice (S. Rep. No. 105, 80th Cong., 1st Sess., 25, in 1 Leg. Hist. 431), Congress enacted a blanket prohibition against the Board's conduct of a second election within a year of the first regardless of the petitioning union's new and improved showing of support obtained after the first election. The terms of Section 9(c)(3) do not express, and its purpose does not go beyond, any objective other than this narrow procedural limitation upon access to the Board's election machinery. Indeed, as

the report of the Joint Committee states, the very fact that the Board's electoral processes are unavailable for a year after an election is itself a reason in favor of not prohibiting recognition strikes and picketing during that time, there being no other means by which the employees can compel recognition.

The upshot is that the insubstantial fragments upon which the Board relies cannot reasonably support the extravagant meaning it imputes to Section 8(b)(1)(A). Picketing is within 8(b)(1)(A) only to the extent of curbing its conduct by coercive means; if picketing is peaceful, 8(b)(1)(A) is indifferent to the end it serves.

E. The distinction between Section 8(b)(1)(A) and Section 8(b)(4).

Final support to our over-all position is obtained when Section 8(b)(1)(A) is compared with Section 8(b)(4). Section 8(b)(4) is concerned with the "end sought," with defining "proscribed objectives." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 702; see also *id.* at 704. By Section 8(b)(1)(A), on the other hand, "Congress was aiming at means, not end." *Perry Norvell Co.*, 80 NLRB 225, 239. "By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal." *Ibid.* When the Board interprets Section 8(b)(1)(A) to prohibit peaceful picketing because its purpose is to secure the recognition of a minority union, it transforms Section 8(b)(1)(A) from a provision designed to curb picketing, when conducted by coercive means, into an instrument to curb picketing, however peaceful, because of the end it furthers. This fundamentally alters the function of Section 8(b)(1)(A) within the statutory scheme:

F. The fallacy of the Board's argument that picketing is per se coercive.

The Board objects, however, that Section 8(b)(1)A) prohibits restraint and coercion of employees *simpliciter;* that peaceful picketing, if successful, causes an employer to lose business; that this loss operates also as economic pressure upon the employees who earn their livelihood from that business; and that peaceful picketing is therefore a coercive technique squarely within the ordinary meaning of the words "restrain or coerce". The obvious vice in the argument is that it engulfs all peaceful picketing whatever its purpose. For this consequence of picketing ensues regardless of the end it serves.[28] The question-begging character of the argument has been recently lucidly exposed by the Arizona Supreme Court (*International Brotherhood of Carpenters, Local 857* v. *Storms Construction Co.*, 324 P.2d 1002, 1005, 42 LRRM 2116, 2119):

> "We recognize that the obvious result of picketing is the refusal of other union employees to cross the picket

[28] The Board has forgotten that peacefully-conducted picketing is not "coercive" in an illegal, common law sense of that term. See "Picketing and Coercion: A Jurisprudence of Epitaph," Edgar A. Jones, 39 Virginia Law Review, p. 1023. While picketing undeniably results in pressure being brought to bear upon the picketed concern through actual or possible business loss, that pressure is something which is no more condemned in our society than other aspects of competition in our economy, such as price cutting which profits one concern at the expense of another. So long as no anti-trust element is present, the latter practice is regarded as a normal and proper feature of our society even though it may drive a business firm out of existence. There is no more reason to bewail the demise of a picketed concern with which a union is engaged in a legitimate primary dispute than that of an undercut concern; both are gone as a result of economic competition but not by "coercion" in the common law sense. And employees who have voted "No Union" are, as a group, in economic competition with the strikers or with employees of other employers who are members of the rejected union. To allow one group to picket the other reflects nothing but adherence to the basic premise in our country that competition rather than government fiat shall be the market place determinant of both profits and wages.

line and thereby curtail the delivery of material and supplies to plaintiff's building project. The economic effect of picketing is a matter of general knowledge. But the effect is the same whether the peaceful picketing is for a lawful or an unlawful object. Hence, proof alone of the economic effect of picketing on the employer is not sufficient as a matter of law to establish an unlawful object or purpose which the state can prohibit."

Neither is it a sufficient basis for the Board to act.

Nor is there any escape from the patent impossibility of the Board's interpretation—one which outlaws all peaceful picketing—by looking to that part of Section 8(b)(1)(A) which confines its operation to restraint and coercion of employees "in the exercise of the rights guaranteed in Section 7." For Section 7 guarantees the right to engage in and "to refrain from *any or all of*" union activity. There is virtually no union activity to which some employees are not opposed. Upon the Board's analysis of the coercive consequence of peaceful picketing, any picketing in furtherance of any union activity will inescapably restrain and coerce some employees in the exercise of their right to refrain from it. *National Maritime Union*, 78 NLRB 971, 986, enforced, 175 F.2d 686 (C.A. 2), cert. denied, 338 U.S. 954; *Perry Norvell Co.*, 80 NLRB 223, 240.

The Board recognizes the dilemma of its position. It seeks to extricate itself by saying that it will strike a balance between practices inimical to the organizational freedom of employees and the need for protection of legitimate competing interests and it will not curb picketing if the restraint it exerts is justified as necessary to the protection of a competing interest which the Act recognizes. Thus the Board, starting from the comfort of "a clear and literal violation of Section 8(b)(1)(A)," quickly abandons it, because its reading clearly and literally prohibits all picketing. To make its escape the Board would arrogate

to itself the role of social arbiter of what it is good or bad to picket for. And the escape the Board thus makes identifies the precise vice of its interpretation. For the balance the Board would strike, Congress has already struck for itself. Congress has in Sections 8(b)(4)(C) and 8(b)(7) defined the exact extent to which it means to go in curbing picketing for recognition purposes. It has left no penumbral area which the Board is free to explore for itself. Instead, both before and after the enactment of Section 8(b)(4)(C), Congress has shown itself fully alert to the complete range of the problem, and it has as a matter of deliberate choice declined to go beyond the point first fixed by Section 8(b)(4)(C) and now fixed by Section 8(b)(7). That choice may be good, bad, or indifferent, but it is for Congress to make. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy. . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363.

In any event, as far as the picketed employees themselves are concerned, peaceful picketing for recognition at best has only a very remote "coercive" effect. In the present case, for instance, it was specifically found that the Union's peaceful picketing in no way directly threatened or intimidated Curtis' employees in the exercise of any rights guaranteed under the Act. Curtis' employees were in no way molested or interfered with in the carrying on of their duties, or in entering or leaving their employer's premises, or at their homes; indeed, they were not even addressed by the pickets who followed their Union's instructions to remain silent while picketing. All that we have here and all that the Board relies on is some indirect and wholly speculative economic loss that the Company's em-

ployees may suffer if, in turn, their employer suffered adverse financial effects as a result of the picketing. And even as to this, there is no attempt to show in this case, and it could not have been shown, that the Employer, whose business and deliveries were in no way affected by the picketing, did in fact suffer any financial damage.

G. The fallacy in the Board's argument that minority picketing induces unfair practices by employers; an employer, even under the Board's hypothesis, commits an unfair practice only when it actually recognizes or bargains with a minority union, and minority picketing need not necessarily result in any such unfair practice.

Even though it be assumed under applicable decisions of the Board that an employer may commit an unfair practice in recognizing or dealing with a minority union (at least where another union is claiming a majority status), this is so only if *at the moment of* recognition or contract signing a majority of the employees have not been persuaded to join with the union. Since an employer is free to urge his employees to join the union, or to point out the advantages of collective bargaining, or otherwise to influence his employees in the matter of union membership so long as not resorting to threat of discharge or other retaliation in the process, the employer is not exactly helpless in the situation where he is confronted with minority picketing. Furthermore, he can ignore the picketing and any union demands made pursuant to the picketing, in the hope that, as happened here, there will be no economic loss or business disruption occasioned by the picketing, or in the hope that, in any event, any possible economic loss occasioned by the picketing would be more than offset by not having to meet union wages or conditions, and in the hope that the union will not be able to maintain the financial cost of picketing for any extended period. Finally, the employees themselves, at any time in the course of the picketing, may well be persuaded by the picketing and by the union appeals made to them to join with their fellow employees in the industry as union members. Thus, at any time during the

course of so-called "recognition" picketing, it might easily come to pass that a majority of the employees involved will, for one reason or another and without any illegal coercion by their employer or from any source, decide to select the picketing union as a bargaining representative, and unless the employer recognizes and bargains with the union prior to this time, no unfair labor practice is involved, even assuming that to extend such recognition has been proscribed. Accordingly picketing for recognition by a minority union, in and of itself, need not necessarily result in an unfair practice and cannot *per se* be considered a violation of the Act. And if the picketed employer actually does recognize and deal with the minority union, other direct methods are available to the "victimized" employees of the "pressurized" employer by way of filing charges and having any resultant agreement set aside and discriminations remedied, as pointed out by Member Murdock in his dissent (R. 59).

H. Until now the Board has consistently held minority picketing for recognition not violative of Section 8(b)(1)(A).

It is also significant that for nine years after the enactment of Section 8(b)(1)(A) no panel of the Board conceived that Section 8(b)(1)(A) could be used for purposes of restraining picketing by minority unions.

In 1948, after full consideration, the Board decided that the touchstone of illegality under Section 8(b)(1)(A) is, not the purpose to accomplish an "illegal objective," but "the *means* by which it is accomplished. . . ." *National Maritime Union*, 78 NLRB 971, 986, enforced, 175 F.2d 686 (C.A. 2), cert. denied, 338 U.S. 954. And so the Board dismissed a complaint insofar as it alleged that, by a strike, picketing, and a wrongful refusal to bargain to secure an invalid hiring hall, the union violated Section 8(b)(1)(A) (*id.* at 982-987).[29] The same year the Board

[29] The conduct was of course illegal under Sections 8(b)(2) and 8(b)(3) of the Act.

decided *Perry Norvell Co.*, 80 NLRB 224, in which, again after full consideration, the Board held that in Section 8(b)(1)(A) "Congress was aiming at means, not end" (*id.* at 239). It therefore dismissed a complaint insofar as it alleged that the union violated Section 8(b)(1)(A) by *inter alia* striking to compel the recognition of a minority union (*id.* at 238-241). Until its abandonment in this case, the Board followed this interpretation without deviation.

Thus late in 1957 the Board overturns an interpretation adopted in 1948, within a year of the effective date of the Taft-Hartley amendments in 1947, and undeviatingly adhered to for nine years. Applicable here is the Supreme Court's condemnation of the attempt of the Interstate Commerce Commission to displace an administrative application of the Interstate Commerce Act apparently less than ten years old. Said the Supreme Court, "It would be difficult indeed to conceive a clearer case of uniform administrative construction . . ."; "all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons"; "At this late date the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation." *United States* v. *Chi. N. S. & Mil. R. Co.*, 288 U.S. 1, 13-14. See also, *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26; *United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 774-775; *United States* v. *Ryan*, 284 U.S. 167, 174-175. This is peculiarly true here where the overturned interpretation involves a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Assn's.*, 310 U.S. 534, 549, quoting from *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315.

IV

SECTION 8(b)(4)(C) OF THE ACT AND MORE LATELY, SECTION 8(b)(7), EXPRESSES THE SOLE EXTENT TO WHICH CONGRESS INTENDED TO REGULATE AS AN UNFAIR LABOR PRACTICE PICKETING BY A UNION OF AN EMPLOYER TO SECURE THAT EMPLOYER'S RECOGNITION OF IT AS BARGAINING REPRESENTATIVE.

Section 8(b)(4)(C) of the Act is the key to the invalidity of the Board's interpretation of Section 8(b)(1)(A) as made as of the time of its decision herein, just as Section 8(b)(7) is the key to the invalidity of its present interpretation made after the enactment of Section 8(b)(7). (The effect of the enactment of Section 8(b)(7) on the Board's present position will be discussed *infra*, Part V. By Section 8(b)(4)(C) Congress then expressed the sole extent to which it intended to regulate as an unfair labor practice picketing by a union of an employer to secure that employer's recognition of it as the representative. And by Section 8(b)(4)(C) Congress has restricted such picketing for recognition only in the situation where *another* union has been *certified* by the Board as the representative of the employees. To prohibit picketing for recognition in any other situation, as the Board by its interpretation of Section 8(b)(1)(A) does, is to embrace a purpose which Congress has deliberately renounced.

Thus, Section 8(b)(4)(C), newly enacted in 1947, provides that it shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to work, "where an object thereof is":

> "forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9."

Prohibiting inducement or encouragement of employees to strike of course forbids peaceful picketing directed to the employees to influence them to engage in a work stoppage.[30]

Equally clearly, however, to strike or picket for recognition is forbidden only where another union has been certified as the representative.[31] As the Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428):

> "It is to be observed that the primary strike for recognition (*without* a Board certification) is *not* proscribed." (Emphasis supplied.)

In virtually identical terms, the House Conference Report states (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in 1 Leg. Hist. 547):

> "It is to be observed that the primary strike for recognition (*without* a Board certification) was *not* prohibited." (Emphasis supplied.)

Congress thus restricted itself to a single narrow area of recognitional activity, namely, "Strikes and boycotts having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union. . . ."[32]

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[30] *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 700-705.

[31] See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 548; S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428; 93 Cong. Rec. 1844, 1846, 4905, in 2 Leg. Hist. 981-982, 986, 1455; 93 Cong. Rec. 136; 5 *Hearings before Committee on Education and Labor, House of Representatives, on Bills to Amend and Repeal the National Labor Relations Act*, 80th Cong., 1st Sess., 3161-62; 4 *Hearings before the Committee on Labor and Public Welfare, United States Senate, on S. 55 and S. J. 22*, 80th Cong., 1st Sess., 1905.

[32] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 548; S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428.

Predecessor versions of Section 8(b)(4)(C) embraced much broader prohibitions. The House bill, as reported and passed,[33] and an early version of the Senate bill,[34] prohibited "any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under Section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law." This proposal banned any recognition strike or picketing except where the labor organization was certified by the Board as the exclusive bargaining representative. In its ultimate evolution, this total ban of any recognition strike or picketing, except in support of the status of a certified union, was narrowed to its present form, which prohibits a recognition strike or picketing only if another union has been certified. Thus, instead of preconditioning the validity of a recognition strike or picketing upon the existence of a certification of the striking or picketing union, Congress did the reverse; it preconditioned the validity of such a strike or picketing solely upon the absence of certification of another union. As a matter of deliberate choice, therefore, except for the narrowly defined activity regulated by Section 8(b)(4)(C), Congress, at the time the Board decided this case, left unrestricted the right of a labor organization to engage in a recognition strike or picketing.

This was fully recognized and endorsed by the Joint Committee on Labor Management Relations. This committee, in the discharge of its function to study and investigate "the administration and operation of existing Federal

[33] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C), in 1 Leg. Hist. 79, 205; see also H. Rep. No. 245, 80th Cong., 1st Sess., 44; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 59; both in 1 Leg. Hist. 335, 563.

[34] S. 360, 80th Cong., 1st Sess., Sec. 13(b) (January 27, 1947).

laws relating to labor relations" (Title IV, Sec. 402(7), Labor Management Relations Act, 1947), reported concerning strikes for recognition (Com. Print., Rep. No. 986, Part 3, 80th Cong., 2nd Session., 70-71):

> "Both the bills passed by the House of Representatives in 1947 [35] and early committee versions of the against a strike for a purpose for which the act provided an administrative remedy. Such a provision would have prohibited a strike for recognition, since the labor organization has available the certification processes of the Board. *The Taft-Hartley law's only limitation upon such strikes is that provided by Section 8(b)(4)(C). The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.*" (Emphasis supplied.)
>
> "*A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.* A number of instances have just been called to the committee's attention (hearings, p. 267)." (Emphasis supplied.)
>
> "Many labor organizations have enjoyed recognition by, and contracts with, employers without ever having been certified by the Board. The employers have not first required such unions to prove their majority status in an election conducted by the Board, being satisfied to rely upon a check of membership cards, Senate bill[36] contained some form of prohibition dues records, or other proof that they were the choice

[35] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C)(ii), in 1 Leg. Hist. 205-206.

[36] S. 360, 80th Cong., 1st Sess., Sec. 13(b)(2) (January 27, 1947).

of the majority of the employees. A union seeking to supplant one of these uncertified bargaining representatives may call a strike for such purpose without violating Section 8(b)(4)(C). This was the situation in the recent *Perry Norvel Co.*, Case (9-CB-3) [80 NLRB 225], in which an uncertified union held a contract with the employer and another union struck for bargaining rights."

"*Present law in no way limits the primary strike for recognition except in the face of another union's certification.* It has frequently been suggested that Section 8(b)(4)(C) should be broadened to cover the situations where another union has been recognized, or has a contract, and where the striking union has failed to win recognition at the ballot box. A fairly good case can be made for such an amendment. It would not go as far as the suggestion prohibiting strikes for purposes for which the law provides an administrative remedy, for the union seeking bargaining rights in an unorganized shop might still strike for it." (Emphasis supplied.)

"There are two factors which might be considered in connection with any further restrictions upon recognition strikes. The first is the time element involved in acquiring bargaining rights by the orderly procedure provided by the act. If the employer will not consent to an election, it now requires an average of 84 days to dispose of a representation case (hearings, p. 1138). It may be questioned whether or not the mere availability of an administrative remedy is sufficient to restrict the right to strike. Perhaps the remedy should be prompt as well as available."

"A second consideration arises out of the fact that Section 9(c)(3) limits elections to one in a given year. A labor organization which loses an election and strikes

for recognition the next day or the next week may be condemned for such action, but there may be equities militating against it having to wait a whole year. The situation may arise where some action by the employer, or a more successful organizing campaign, causes the union to acquire an overwhelming majority within a few weeks following an election in which it has been rejected by the employees."

"The committee believes that further experince with the act is advisable before consideration is given to broadening Section 8(b)(4)(C)."

The report thus recognizes that (1) "Present law in no way limits the primary strike for recognition except in the face of another union's certification"; and (2) "A labor organization may lose an election in which it was the only union on the ballot and the next day call a *legal* strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it." (Emphasis supplied.)

There can be no question of the validity of the report of the Joint Committee as an authoritative expression of the congressional purpose. This Court has relied upon it at least four times. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75, n. 14; *N.L.R.B.* v. *Lior Oil Co.*, 352 U.S. 282, 288 and n. 5, and concurrence at 299-300; *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 9, n. 15, and dissent at 14 and n. 3, 15, n. 7; *American Newspaper Publishers Association* v. *N.L.R.B.*, 345 U.S. 100, 108, n. 8. This Court has quoted with approval that report's observation that "Present law in no way limits the primary strike for recognition except in the face of another union's certification." *United Mine Workers* v. *Arkansas Oak Flooring Co., supra.* It has observed that "the Joint Committee of Congress [was] created by the very Act" which is the subject of its report "to study the operation of the federal labor laws." *N.L.R.B.* v. *Lion Oil Co., supra.* The Court of Appeals for the Sixth Circuit, after careful consideration

of the reasons for the creation of the Joint Committee and the circumstances of its operation (188 F. 2d at 921-924), considered its report "illuminating" (*id. at* 921) and "persuasive evidence" (*id.* at 923) of congressional intent. *N.L.R.B.* v. *Wiltse*, 188 F. 2d 912, 921-924 (C.A. 6), cert. denied, 342 U.S. 859. See also *Herzog* v. *Parsons*, 181 F. 2d 781, 788 (C.A.D.C.), cert. denied, 340 U.S. 810.

The report of the Joint Committee closed with the observation that "The committee believes that further experience with the act is advisable before consideration is given to broadening Section 8(b)(4)(C)" (*supra*, p. 13). Until 1959 experience had not led Congress to enlarge its scope.

In the period between 1948 and the present time, Congress has had a great deal of experience with the operation of Taft-Hartley in the field of recognitional picketing by minority unions which, until the present decision of the Board, had been a protected, not a prohibited, union activity. Until 1959 Congress refused to broaden the scope of Section 8(b)(4)(C), although in most every Congress since the Eightieth, bills to enlarge Section 8(b)(4)(C) and to prohibit minority picketing have been introduced but have not been passed. See, for instance, the following: H. R. 2032, 81st Cong., 1st Sess. (Jan. 31, 1949); H. R. 4811, 81st Cong., 1st Sess., Sec. 208(b)(2) (May 23, 1949); S. 249, 81st Cong., 1st Sess., Sec. 106(d) (Jan. 31, 1949); H. R. 1311, 83rd Cong., 1st Sess., Sec. 106(d) (Jan. 7, 1953); H. R. 3533, 83rd Cong., 1st Sess., Sec. 2(4) (Feb. 26, 1953); H. R. 216, 84th Cong., 1st Sess., Sec. 106(d) (Jan. 5, 1955); H. R. 1000, 85th Cong., 1st Sess., Sec. 106(d) (Jan. 3, 1957). A bill to like effect, but not identically worded, is H. R. 4914, 81st Cong., 1st Sess., Sec. 8(a)(4)(B) (May 31, 1949). See also S. Rep. No. 99, 81st Cong., 1st Sess., 59, 67-68, Minority Views 29; H. R. 4795, 83rd Cong., 1st Sess. (April 22, 1953); S. 1311, 83rd Cong., 1st Sess. (March 13, 1953).

These efforts to enlarge Section 8(b)(4)(C) were con-

tinued in the 1958 Congress where the precise subject of recognition and organizational picketing was again discussed by Congress at length, and where once again proposals to restrict such picketing were defeated. An elaboration of these efforts to enlarge the scope of Section 8(b)(4)(C) to include organizational picketing is enlightening. Among President Eisenhower's recommendations for new labor legislation, as set forth in his January 23, 1958, Message to Congress, was the following (41 LRRM 78, 81):

> "Amend the Act to make it an unfair labor practice for a union, by picketing, to coerce an employer to recognize it as the bargaining representative of his employees or his employees to accept or designate it as their representative where:
>
> The employer has recognized in accordance with law another labor organization;
>
> The employees, within the last preceding twelve months, have rejected the union in a representative election; or
>
> It is otherwise clear that the employees do not desire the union as their bargaining representative."

Immediately following the President's message, S. 3099 (January 23, 1958), H.R. 10248 (January 23, 1958), and H.R. 10273 (January 27, 1958) were introduced, and Section 4 thereof provided that Section 8(b) of the Taft-Hartley Act be amended to make it an unfair labor practice for a labor organization or its agents:

> "(1) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer with the object of forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative:

(A) where the employer has recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act, or

(B) where within the preceding 12 months a valid election under Section 9(c) of this Act has been conducted, or

(C) where the labor organization cannot establish that there is a sufficient interest on the part of the employees in having such labor organization represent them for collective bargaining purposes, or

(D) where such picketing has been engaged in for a reasonable period of time and at the expiration of such period an election under Section 9(c) has not been conducted."

In introducing S. 3099, Senator Smith explained with respect to this feature of it that (104 Daily Cong. Rec. 1137 (Jan. 30, 1958)):

> "The bill would also amend the National Labor Relations Act so as, *for the first time*, to deal specifically with organizational and recognition picketing. Such picketing has been generally criticized and there are many who would prohibit it completely. The bill would not do this but it would restrict picketing to force organization or recognition to situations where the employees in question have evidenced sufficient interest in having the union as their bargaining representative and even then would permit it only for a reasonable period of time within which a representative election would have to be conducted." (Emphasis supplied.)

But the bill which reached the floor of the Senate for a vote (S. 3974), entitled "Labor-Management Reporting and Disclosure Act of 1958," did not contain the Administration's proposed restriction upon recognition picketing. And so on June 12, 1958, Senator Smith introduced an amend-

ment to S. 3974 providing the identical limitation upon recognition picketing which he had theretofore introduced as S. 3099 (quoted above). 104 Daily Cong. Rec. 9897-98 (June 12, 1958). This was number one of eighteen amendments then introduced by Senator Smith on behalf of the Administration to correct alleged defects in S. 3974. *Id.* at 9902. In describing the amendment pertaining to recognition picketing, Senator Smith stated (*id.* at 9898):

> "The proposed amendment would restrict organizational or recognition picketing to those situations in which the union can show a sufficient interest on the part of the employees in being represented by it and would restrict the duration of such picketing to a reasonable period of time during which a representation election would have to be conducted to determine the employees' wishes as to a collective bargaining representative. The determination of sufficient interest and reasonable period of time would rest with the National Labor Relations Board."

But Senator Smith "decided not to bring up" this and other amendments "because of the obvious impossibility of their passage. These proposals of the administration will await further consideration at some future time." 104 Daily Cong. Rec. 10374 (June 17, 1958). In a statement of supplemental views, Senator Smith, together with Senators Goldwater, Purtell and Allott, noted that "We regret that no attempt was made to remedy the long-standing deficiencies and weaknesses in the present law. We refer to [among others] . . . organizational or recognitional picketing against the wishes of the employees. . . ." *Id.* at 10373. And in like tenor Senator Johnston stated, "But I think it is safe to say that Congress must in the future approach the questions of . . . organizational picketing among others. These have not been settled to the satisfaction of anyone. At the present time, we probably do not have enough information to settle them to the satisfaction of anyone." *Id.*

at 10374. The restriction upon recognition picketing having been rejected, S. 3974 then passed the Senate (104 Daily Cong. Rec. 10381 (June 17, 1958)), but it failed of enactment when the House declined to suspend the rules to vote upon it (104 Daily Cong. Rec. 16817, 16841 (August 18, 1958)).

The foregoing history of Section 8(b)(4)(C), both before and following its enactment up to 1959, makes it entirely clear that Congress has been willing to commit itself in the area of recognition picketing only to the limited extent of prohibiting such picketing when another union has been certified as the bargaining agent, and that Congress has refused to go further. Under such circumstances, the remarks of the Supreme Court of the United States in *United States* v. *International Boxing Club*, 348 U. S. 236, at p. 244, in respect to the significance of a similar attempt to extend the coverage of the anti-trust laws are applicable:

> " . . . No further action was taken on any of the bills: Congress thus left intact the then-existing coverage of the antitrust laws. Yet the defendants in the instant case are now asking this Court for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated. For we agree that 'Such a broad exemption could not be granted without substantially repealing the antitrust laws.' "

If the Board is correct in its 1957 interpretation of the Act as already prohibiting minority picketing for recognition, Congress apparently has been laboring in vain those many years until its recent action in 1959 to decide whether to enact into law this same prohibition. What actually happened, however, was that the present Board rushed in where Congress feared to tread and where all previous Boards have refrained from treading. The "balance" which the present Board has attempted to strike Congress

has already struck for itself; Congress has made the choice. That choice may be pleasing to some and not to others, but it is for Congress and not the Board to make. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355, 363.

Section 8(b)(4)(C) of the Act, or, equally, the newly enacted section 8(b)(7), "has no place in this Statute if Section 8(b)(1)(A) can be interpreted broadly to forbid picketing by a minority labor organization for recognition. For the type of picketing prohibited by Congress in Section 8(b)(4)(C) necessarily is in the category now forbidden under Section 8(b)(1)(A). Thus, through administrative interpretation of one provision, the specific language of another statutory provision in this Act has been reduced to "a useless gesture."[37] We are therefore required to conclude, if we are to accept the Board's current interpretation of Section 8(b)(1)(A), that Section 8(b)(4)(C) and, as we will see, Section 8(b)(7) are idle collections of words. That conclusion is impermissible. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be

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[37] Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430. Upon the expiration of the term of Member Murdock, who dissented in this and the companion *Curtis* case, Member Fanning was appointed to succeed him. Not having participated in the earlier *Curtis* decision, Member Fanning considered his position on this issue *de novo*, and concluded that the Board's current interpretation of Section 8(b)(1)(A) was an impermissible construction.

so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all parts harmonize, if possible, and give meaning to each." *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116.

To escape the force of this observation the Board's brief makes three meritless arguments. We turn to these.

(a) The Board brief argues that Section 8(b)(4)(C) prohibits a *majority* union from striking or picketing for recognition, even if the incumbent union has only minority support, so long as the incumbent's certification as the representative remains formally unrevoked; whereas Section 8(b)(1)(A) prohibits only minority strikes or picketing for recognition (Bd. br. pp. 32-33). But the view that Section 8(b)(4)(C) prohibits majority strikes or picketing for recognition in the face of an unrescinded certification of a minority union commands the assent of only two of the five members of the Board;[38] the Board itself has explictly reserved decision upon this question;[39] and the question is an unsettled and extremely troubling one.[40] Moreover, even if we accept the proposition stated in the

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[38] *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430, 42 LRRM 1195, 1196, n. 5.

[39] *District 50, United Mine Workers*, 106 NLRB 903, 906. See also, *Warehouse & Distribution Workers Union, Local 688*, 116 NLRB 923, 924; *Local No. 224, Allied Industrial Workers*, 116 NLRB 890, 892.

[40] The view expressed in the Board brief is in conflict with *Kennedy* v. *Warehouse Workers Union, Local 688*, 37 LRRM 2496, 2499 (D.C.E.D. Mo.). Of the four cases cited in the Board's brief at p. 33, n. 19, we read only *Parks* v. *Atlanta Printing Pressmen*, 243 F. 2d 284 (C.A. 5), cert. denied, 354 U.S. 937, as square support for the position stated in the Board brief.

Board brief, it hardly follows that this constitutes an adequate explanation of Section 8(b)(4)(C)'s reason for being. For, during the first year of its certification, a certified union is ordinarily conclusively deemed to possess majority status (*Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96), and thereafter it is presumptively deemed to possess majority status (*Celanese Corporation*, 95 NLRB 664, 672). It turns things upside down to find the true importance of Section 8(b)(4)(C), not in the protection it extends to the conclusive or presumptive majority status of the certified union, but in the supposed solicitude for the status of a minority union whose certification is formally unrevoked. "This suggested residue of utility left to 8(b)(4)(C) is . . . of little significance."[41]

(b) The second argument in the Board brief is this: for violations of Section 8(b)(4)(C), the temporary injunction procedures of Section 10(l) are applicable, whereas for violations of Section 8(b)(1)(A) those of Section 10(j) apply; that for violations within the purview of Section 10(l) the Board *must* seek a temporary injunction, while for those within 10(j) the Board *may* seek a temporary injunction; and that Congress differentiated between recognition strikes and picketing, placing those where another union was certified under Section 8(b)(4)(C) and others under Section 8(b)(1)(A), in order to make the 8(b(4)(C) violation "subject to the mandatory injunction feature" (Bd. br. p. 34).

This is a truly extraordinary explanation. Tying it in with the first explanation in the Board brief, it means that Congress intended it to be *mandatory* for the Board to seek a temporary injunction restraining *majority* strikes and picketing for recognition, if the incumbent was a minority union still possessing an unrevoked certification, but

[41] Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB 1425, 1430, 42 LRRM 1195, 1198.

that Congress left it *discretionary* with the Board to seek a temporary injunction restraining *minority* strikes and picketing where no certified union was in the picture! The truth is that the separate temporary injunction procedures have nothing to do with defining the scope of the substantive wrong. As the Board explained in *Perry Norvell Co.*, 80 NLRB 225, 240:

> "The General Counsel, to be sure, asserts that strike for recognition in the face of an outstanding certification of another labor organization is an unfair labor practice also under Section 8(b)(1)(A), as well as under Section 8(b)(4)(C), and that the latter section is not thereby rendered redundant. He argues that its purpose is merely to insure the expeditious handling of, and the immediate application for appropriate injunctive relief against, recognition strikes in the face of an outstanding certification. However, Section 8 does not deal with remedy. It is devoted solely to defining unfair labor practices by employers and labor organizations. It is Section 10(l) that deals with special remedies in strike situations under Section 8(b)(4)(C). If Congress had really intended Section 8(b)(4)(C) to have primarily a procedural effect, it would surely have inserted its terms in Section 10, rather than in Section 8."

Indeed, it is plain on the face of Section 10(l) that when Congress truly sought a differentiation in remedy, it said so in the remedy section, not by indirection in the substantive section. Section 8(b)(4) defines four substantive violations, (A), (B), (C), and (D). With respect to the first three, Section 10(l) specifies the procedure to be followed "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 8(b)," including a mandatory application for a temporary injunction if there is reasonable cause to believe that a violation has been committed. The concluding sentence of Section 10(l) then

reads: "In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)." Thus, when Congress sought to make an application for a temporary injunction discretionary where, unlike subdivisions (A), (B), or (C), a subdivision (D) violation was charged, it expressed its purpose in the remedy section. It did not remove subdivision (D) from its position in Section 8(b)(4) and place it elsewhere in section 8(b). Neither did it insert subdivision (C) into Section 8(b)(4) in order to achieve a procedural end.

(c) Another argument in the Board brief is that, in particularizing in some of the later subsections of 8(b) conduct that is also covered by the more general language of 8(b)(1)(A), Congress was only following the established pattern of draftsmanship employed in Section 8(a), where subsequent subsections deal with specific forms of employer restraint and coercion prohibited in Section 8(a)(1). This is the sort of uncritical paralleling of Section 8(a)(1) and Section 8(b)(1)(A) which we have already discussed (*supra*, pp. 23-24). As the Court of Appeals for the Seventh Circuit held, "Nor can we agree with the contention . . . that a violation of other subsections of 8(b) are also necessarily violations of § 8(b)(1)(A) in the same manner that violations of other subsections of § 8(a) have been held to be violations of § 8(a)(1)." *American Newspaper Publishers Ass'n* v. *N.L.R.B.*, 193 F.2d 782, 801, cert. denied, 344 U.S. 812. For, "it is clear from the wording of § 8(b)(1)(A) that it is not a general clause which also prohibits the unfair labor practices described in subsequent paragraphs of subsection 8(b)." *Id.* at 806.

V

SECTION 8(b)(7), ENACTED IN 1959, INDICATES THE FULL EXTENT TO WHICH CONGRESS DESIRED TO REGULATE MINORITY RECOGNITION OR ORGANIZATIONAL PICKETING.

As stated in the Board's Brief, pp. 53-54, subsequent to the ruling of the court below, Congress amended the Act by adding a new unfair labor practice provision, Section 8(b)(7), which specifically proscribes the type of activity involved herein.[42] It is the position of the Respondent that the legislative history of Section 8(b)(7) establishes that the *Curtis* and *Alloy* doctrines are based upon improper interpretations of Section 8(b)(1) and, in any event, do not survive the enactment of Section 8(b)(7) in which Congress, after careful consideration and extensive debate, expressed its conclusions concerning the extent of the restrictions to be imposed upon organizational and recognition techniques.

The original Kennedy-Erwin bill, as reported to the Senate by the Labor Committee, contained no restrictions on organizational and recognition picketing and thus left intact the previous prohibition as set forth in Section 8(b)(4)(C).[43] In a minority report Senators Goldwater and Dirksen expressed their opposition to the Committee Bill as follows:

> ". . . the committee bill by completely ignoring recognition and organizational picketing by labor unions which do not represent a majority of the employees in the picketed enterprise, fails to provide the very protection of these employee rights which the Taft-Hart-

[42] The relevant provisions of the new Act are set forth in the Appendix to the Board's Brief, pp. 65-66.

[43] The Committee rejected an amendment offered by Senator Goldwater, which would have implemented the recommendations of the Administration on organizational and recognition picketing. 105 Cong. Rec. A8520 (October 2, 1959).

ley Act prescribes. By doing nothing to limit such picketing, the committee bill, in effect, permits employees to be restrained or coerced in their right to join or not to join a union, to select or refuse to accept a union as their collective-bargaining representative, as well as permitting an employer to be coerced into violating the law by forcing him to recognize a union which the majority of his employees do not wish either to join or to select as their bargaining representative, thus depriving them of the rights guaranteed to them by law."[44]

The Senate rejected an amendment to the Committee Bill offered on the floor by Senator McClellan in an attempt to deal specifically with the subject of recognition and organizational picketing in accordance with the recommendations made by President Eisenhower in 1958 and again in 1959. 105 Cong. Rec. 5951, 5961 (April 24, 1959). Then consideration was given to a less restrictive amendment proposed by Senator Prouty. 105 Cong. Rec. 5961-5976 (April 24, 1959). And finally the Senate adopted an even less restrictive amendment—a substitute to the Prouty amendment—which banned organizational and recognition picketing for nine months after a representation election and where another union had been certified or lawfully recognized by the employer. 105 Cong. Rec. 5976-5978 (April 24, 1959).

The House Bill represented a much stricter approach to the question. Its provisions barred organizational and recognition picketing (1) for twelve months following a representation election; (2) where another union was certified or lawfully recognized by the employer; (3) where picketing has continued for a reasonable time (not to exceed thirty days) and no election has been requested; and (4) the union cannot show 30% interest among the employees. H.R. 8400, 86th Cong., 1st Sess., Sec. 705(c); 105

[44] S. Rep. No. 187, 86th Cong., 1st Sess., p. 74 (minority views).

Cong., Rec. 13125 (July 27, 1959), 14519-14520 (August 13, 1959). With the exception of the proscription where a union cannot show 30% interest, the House provisions were adopted by the Conference Committee and appear in the Bill as finally approved. Conference Report, H. Rep. no. 1147, 86th Cong., 1st Sess., pp. 27-28.: Public Law 86-257, 86th Cong., 1st Sess., Sec. 704(c). It thus appears that Congress considered the whole gamut of possible legislative approaches to the question of organizational and recognition picketing, and by the enactment of Section 8(b)(7) struck what it considered to be a proper balance of the legitimate interests involved. And we submit that Congress would not have outlawed peaceful recognition picketing in certain specific set notions through the enactment of Section 8(b)(7) if Section 8 (b)(1) already contained the restrictions claimed by the Board.[45]

Nor does the savings clause of Section 8(b)(7) sustain the position that the more restrictive aspect of the *Curtis* and *Alloy* doctrines survive the enactment of Section 8(b)(7). As Professor Cox has reasoned, "It would seem wrong . . . to interpret the vague words of Section 8(b)(1) as a license for administrative and judicial construction of restrictions upon concerted activities as organizational techniques after Congress had sharply debated the issue and expressed its conclusions in Section 8(b)(7)."[46] Rather, the savings clause can be read "as a caveat intended to eliminate the risk that new Section 8(b)(7) would be taken to restrict the prohibitions upon secondary boycotts or jurisdictional disputes." *Ibid.*

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[45] It is also significant that the Board's ban on minority recognition picketing under Section 8(b)(1) would be indefinite and thus directly in conflict with the time-element provisions of Section 8(b)(7).

[46] "The Landrum-Griffin Amendments to the National Labor Relations Act," an Address by Archibald Cox, Royall Professor of Law, Harvard Law School before the Labor Law Section of the Minnesota State Bar Association on November 6, 1959.

By "recount[ing] the pertinent events" *(ibid.)*, Professor Cox, who served as advisor to Senator Kennedy, the Chairman of the Senate Labor Committee and Conference Committee, has clarified the ambiguous savings clause as well as the ambiguous sentence in the Statement of the Managers on the Part of the House, in the Conference Report that "Section 8(b)(7) overrules the Curtis and Alloy cases to the extent that those decisions are inconsistent with section 8(b)(7)" (H. Rep. No. 1147, 86th Cong., 1st Sess., p. 41). In his recent address, cited *supra*, Professor Cox explained:

> "The ambiguous sentence in the statute was not overlooked. On the part of the Senate the fear was expressed that it might keep alive the litigation over the *Curtis* and *Alloy* doctrines and thus lead to judicial and administrative restrictions in addition to those imposed by Section 8(b)(7). The answer disclaimed such an intent but the proponents of the Landrum-Griffin bill were unwilling to delete the sentence for fear that the deletion might somehow be construed to imply that Section 8(b)(7)-qualified Section 8(b)(4) or other unfair labor practices having nothing to do with the use of picketing or other publicity in an organizing campaign. The difference was resolved by the suggestion that the House Managers should include the following statement in their explanation of the Conference Agreement:
>
> > "The final sentence in proposed section 8(b)(7) is intended to make it clear that section 8(b)(7) does not qualify any of the other unfair labor practices under section 8(b). *Section 8(b)(7) is, of course, intended as a definitive legislative disposition of the problems involved in the Curtis and Alloy cases.*"

This passage was mimeographed on a sheet containing two similar passages compromising other issues, distributed and read aloud at a later meeting of con-

ferees with the staff present, and approved without dissent. The Statement of the House managers had not been prepared when the Senate voted. If was not shown to the Senate staff. Instead of the agreed explanation it contained the sentence quoted above. The sense would be the same if the actual Statement means that the court decisions in the *Curtis* and *Alloy* cases are overruled where inconsistent with Section 8(b)(7)." (Emphasis added.)

Notwithstanding Congressional hesitation for ten long years to legislate in the field of recognition and organizational picketing, and notwithstanding the fact that when Congress did choose to do so it legislated only in carefully prescribed areas, and with respect to certain specific situations, the Board, nevertheless, here asserts and has already taken the formal view in a recent decision (*Sierra Furniture Company*, 125 NLRB No. 20) that it still has the choice of using both Section 8(b)(1)(A) as well as Section 8(b)(7)—that it can use the shotgun as well as the carefully aimed rifle. Member Fanning, dissenting in *Sierra Furniture*, had this to say of the effect of the new Act:

> "Neither the proponents nor opponents of this provision of the new amendments were of the opinion that the then existing law proscribed such practices. Nor has there been any suggestion that the new amendments are merely declaratory of existing law. Indeed, the prohibition, under carefully prescribed circumstances, of organizational and recognition picketing is included in the amended Act, not as an amplification of Section 8(b)(1)(A), but in an entirely new subsection, 8(b)(7)."

There are only two judicial comments on the Board's position that, in spite of the enactment of Section 8(b)(7), it can continue to utilize Section 8(b)(1)(A) in the field of recognition and organizational picketing. In the recent case of *NLRB* v. *Teamsters, Local 182*, decided by the Court of

Appeals for the Second Circuit on November 27, 1959, 5 LRRM 2202, Judges Clark, Moore, and Smith disagreed with the Board's present position. They stated (45 LRRM at 2205):

"The Board found also that the peaceful picketing by the Union minority for recognitional purposes amounted to restraint and coercion of the employees in the exercise of the rights guaranteed in Section 7 (the right to join labor organizations or refrain therefrom). This is a troubled question. The Board for some years after the passage of the Act took the view that peaceful picketing for such purposes was not restraint or coercion within the meaning of 8(b)(1)(A). *Perry Norvell*, 80 N. L. R. B. 225. In a number of recent cases, however, it has swung over to the opposite conclusion. The courts have been divided in enforcement actions since the Board adopted its present view. The Court of Appeals for the District of Columbia recently rejected this view. *Drivers Local 639* v. *N. L. R. B.*, D. C. Cir., 1958, 43 LRRM 2156, 36 CCH Labor Cases 65,030 (Miller, *J.*, dissenting), certiorari granted (1959), 359 U. S. 965. The Court of Appeals for the Fourth Circuit, however, has adopted it. *N. L. R. B.* v. *United Rubber, etc. Workers Local 511*, 4 Cir., 269 F. 2d 694 (Sobeloff, J., dissenting). The legislative history is inconclusive, expressions by Senator Taft and others during the consideration of the legislation being cited by both sides of the controversy. Legislative History of the Labor Management Relations Act, Govt. Print. Off., 1948. Some of the confusion undoubtedly arises from the fact that the discussions centered largely around mass and other violent forms of picketing. II Leg. Hist. 1205-1206. In 1948 The Watchdog Committee interpreted the Act as limiting recognitional strikes in Section 8(b)(4)(C), but not otherwise. Senate Rep. 986, pt. 3, 80th Cong., 2nd Sess., pages 70, 71, 85, 87. All picketing has in it elements of coercion and restraint at least through the

solicitation of the support of public opinion even though the primary purpose may be to publicize to the employees the merits of the controversy. Yet if the Congress had intended to prohibit all organizational and recognitional picketing it would unquestionably have done so directly rather than indirectly as "coercion and restraint." This is borne out by its doing so in the limited class of recognitional picketing cases covered by 8(b)(4)(C) and by its recent action, following claimed abuses of such picketing, by limiting further the situations in which it may be used. In this troubled field we should be especially hesitant to anticipate Congressional action. The Congress is equipped to inform itself fully and carefully to develop governing legislation. We should proceed cautiously when urged to outrun the legislative mandate. *Rabouin* v. *N. L. R. B.*, 2 Cir., 195 F. 2d 906, 912. The original administrative construction, adhered to for some nine years, is bolstered by the action taken by the present Congress, in Pub. Law 86-257, 733 Stat. 519, Sec. 704 (c), which now makes it an unfair labor practice for a noncertified union to conduct peaceful picketing for recognitional purposes in certain situations under the Act, including that which existed here, where within the preceding twelve months a valid election under Section 9(c) has been conducted. It is plain from the wording of the subsection as a whole, that peaceful recognitional picketing was not considered to have been generally proscribed by 8(b)(1)(A), or the paragraph 8(b)(7) would have been unnecessary.

The Board's order in the case at bar is broader than the prohibitions of the new Section 8(b)(7), broad enough to prohibit picketing, more than 12 months after an election, where no other union has been lawfully recognized, and where the time for a petition under 9(c) has not run. The Board has attempted to go farther than the Congress later determined to go.

Since the Congress has now set the standards for the future, the precise question presented here is unlikely to recur. We do not have before us questions as to the precise scope and applicability of 8(b)(7) which will undoubtedly be decided in other cases on future records of findings as to activities after the effective date of the new Act. In the case at bar we consider the situation as it was prior to the new Act, and hold that 8(b)(1)(A) was not intended to proscribe the peaceful recognitional picketing at the plant of the primary employer in the manner found to have occurred here."

And in his dissenting opinion in *N.L.R.B.* v. *United Rubber Workers*, 269 F.2d 694, 702 Chief Judge Sobeloff of the Court of Appeals for the Fourth Circuit, stated as follows:

"I find further and even more persuasive evidence in the recent vigorous and extended Senate debate on the Kennedy-Erwin Bill. 105 Cong. Rec. 5951-5978. Both its proponents and opponents seem to have predicated the discussion upon the view that the present law has not proscribed these practices. The tenor of the arguments advanced by Senators who condemned such conduct was that there is a present need to amend the law to make these practices illegal."

VI

THE FREE SPEECH ASPECTS OF PICKETING AND THE PROTECTIONS THEREOF GIVEN UNDER SECTION 8(c) OF THE ACT REQUIRE THAT PICKETING NOT BE PROSCRIBED BY INTERPRETATION BUT ONLY IF EXPRESSLY COMMANDED BY CLEAR LANGUAGE IN THE ACT.

Even if Section 13 had not been written into the Act, it nevertheless would have to appear quite clearly in the language of the Act that Congress actually intended to proscribe the traditional union activity of minority picketing

for recognition before the Board could undertake to cut it down. This is so because, whatever the hybrid nature of picketing as embodying elements both of free speech and of inducement to action (*International Brotherhood of Teamsters, etc.* v. *Hanke, et al.*, 339 U.S. 470; *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769), picketing nevertheless continues to be the workingman's principal means of communication. (*Drivers Union* v. *Meadowmoor Co.*, 213 U.S. 287, at 293; *Thornhill* v. *Alabama*, 310 U.S. 88, at 95). As stated in *Carlson* v. *California*, 310 U.S. 106, at 112:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern . . . [publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

Thus, to the extent that peaceful picketing is an aspect of free speech, it is in a preferred position and must be presumptively favored as against assertions in doubtful cases that it has been proscribed. Restraint of picketing is the "exception rather than the rule" (*Bursyn* v. *Wilson*, 343 U.S. 495, at 503); it is to be "guarded with a jealous eye" (*A.F.L.* v. *Swing*, 312 U.S. 321; and in "borderline instances" the doubt is to be resolved in favor of freedom of speech (*Pennekamp* v. *Florida*, 328 U.S. 331, 347).

When fear was expressed that Section 8(b)(1)(A) was capable of expansive interpretation, Senator Taft stated that Section 8(c) would guard against it, observing that "the provision regarding free speech applies both to employer and employee."[47] Section 8(c) provides that:

> "The expressing of any views, argument, or opinion

[47] 93 Cong. Rec. 4020, in 2 Leg. Hist. 1023.

or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

The Board contends that *Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, is conclusive that Section 8(c) of the Act is inapplicable to this case. Precisely the contrary is true. That case holds only that the "general terms of § 8(c) appropriately give way to the specific provisions of § 8(b)(4)" (341 U.S. at 705-706). This conclusion was reached upon consideration of the specific words of Section 8(b)(4)—making it an unfair labor practice "to *induce or encourage* the employees of any employer"—the place of Section 8(b)(4) in the statutory scheme, and the purpose it was designed to serve. And in reaching this conclusion this Court *contrasted* the breadth of Section 8(b)(4) with the restricted reach of Section 8(b)(1)(A).

Thus, this Court stated that "The intended breadth of the words 'induce or encourage' is emphasized by their contrast with the restricted phrases used in other parts of § 8(b). For example, the unfair labor practice described in § 8(b)(1) is one 'to restrain or coerce' employees . . ." (341 U.S. at 703). In addition, the Supreme Court observed that to read Section 8(c) into Section 8(b)(4) would *duplicate* the reach of Section 8(b)(1)(A), for it would then limit the type of inducement reached by Section 8(b)(4) to that containing a "threat of reprisal or force or promise of benefit," the very limitation written into Section 8(b)(1)(A). Said the Court (341 U.S. at 701-702):

"To exempt peaceful picketing from the condemnation of § 8(b)(4)(A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words "induce or encourage" are broad enough to include in them every form of in-

fluence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8(b)(4) defining the proscribed objectives, because the use of "restraint and coercion" for any purpose was prohibited in this whole field by § 8(b)(1)(A)."

Thus this Court stated in so many words that Section 8(b)(1)(A) does not reach peaceful picketing; that to give Section 8(b)(4) meaningful scope it was necessary to read it to go beyond Section 8(b)(1)(A) so as to reach peaceful picketing; and that the difference between Section 8(b)(4) and Section (8)(b)(1) was that in Section 8(b)(4) Congress intended to reach picketing because of its purpose.

Thus this Court's decision in *Electrical Workers* confirms the exemption of peaceful picketing from the reach of Section 8(b)(1)(A) and the applicability of Section (8)(c) to guarantee its immunity.

The recent case of *Teamsters Local 795*, v. *Newell*, 345, U.S. 341, reversing *per curiam*, 181 Kansas 898, 317 P. 2d 817 is revealing. In that case, unlike the situation in *Building Service Union* v. *Gazzam*, 339 U.S. 532; *Pappas* v. *Stacy*, 151 Me. 36, 116 A. 2d 497; and *Teamsters Local* v. *Vogt, Inc.*, 354 U.S. 284, there was involved, as here, a situation in which the picketing in question was carried on pursuant to an original legitimate strike over the terms of a collective agreement, and where, as here, the striking union had lost its majority through the permanent replacement of the striking union members by strike-

breakers and non-strikers. The Kansas Supreme Court had sustained a temporary injunction prohibiting the striking union from "intimidating or coercing" the employer and his non-union employees through picketing of the employer's place of business. In respect to the picketing, the Kansas Supreme Court had stated:

> ". . . The purpose of this coercive picketing was to strangulate the appellee's business and it was no doubt the hope of the appellant Union that this would hasten appellee's recognition of the Union's demands. Coercive picketing is unlawful and contrary to the public policy expressed by the legislature of Kansas."

In reversing, this Court's *per curiam* decision merely cited as authority its holding in *Thornhill* v. *Alabama*, 310 U. S. 88. Since the *Newell* decision followed the decision of the Supreme Court in *Vogt*, *supra*, it appears that there is still considerable life in the picketing-as-free-speech pronouncements in *Thornhill*, at least where applied in a traditional field of labor activity and where only the immediate persons involved in a legitimate primary labor dispute are affected by the picketing.

VII

THE BOARD'S CURRENT APPROACH OVERLOOKS THE COMPROMISE CHARACTER OF THE TAFT-HARTLEY AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT.

In concluding that Section 8(b)(1)(A) broadly prohibits picketing to secure the recognition of a minority union, the Board has overlooked a vital element of the legislative process. "Legislation is often tentative, beginning with the most obvious case, and not going beyond it, or to the full length of the principle upon which its acts must be justified." Mr. Justice Holmes in *Beard* v. *Boston*, 151 Mass. 96, 97, 23 N.E. 826, 827. It is this "cautious advance, step by step, and the distrust of generalities which sometimes have been

the weakness, but often the strength, of English legislation." *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 411. This approach is characteristic of the Taft-Hartley amendments to the National Labor Relations Act. "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interest. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 99-100. And so, in "a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously." *Rabouin* v. *N.L.R.B.*, 195 F. 2d 906, 912 (C.A. 2). The Board in this case has isolated a single principle, pushed it to a logical extreme, and reached a determination which Congress, fully aware of the whole range of the problem and the opposing claims and interests with which it bristles, has deliberately refrained from embracing. It is no part of the function of the Board to be "a super-Congress." *N.L.R.B.* v. *National Maritime Union*, 175 F. 2d 686, 691 (C.A. 2), cert. denied 338 U.S. 954.

CONCLUSION

We conclude with the following pertinent remarks of the Trial Examiner in this case made in the concluding portion of his Report (R. 85):

> "If Congress wishes to sound the death knell to peaceful, recognition picketing by a minority because of the

economic pressures such picketing exerts on an employer, it of course, may do so, but it may not be done by administrative fiat. As the New York Court of Appeals stated in *Wood* v. *O'Grady*, 307 N.Y. 532; cert. denied 349 U.S. 939, 'It is axiomatic that we may not, under the guise of interpretation, import into a statute conditions or criteria which the legislature has been careful to omit.' See also *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.*, 338 U.S. 355."

For the reasons set forth above it is respectfully submitted that the Order of the Board in the present case be set aside and the decision of the court below be sustained.

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